
IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NORTHWESTERN STEAMSHIP COMPANY, LIMITED, Petitioner,

Appellant,

vs.

C. RANSOM, JOHN HANNAFIN, A. ARTAL, GUST ANDERSON, ERIK JOHNSON, SAM ATKINSON, WILLIAM LUNDBERG, J. L. PORTER, TOM BERG, JACOB OSTERHOLM, J. L. SAGE, JOHN BORLAND, J. R. MORELAND, LOUIS MARTIN, MATT MATTSON, WILLIAM R. PIERCE, H. A. BROADED, P. McCORMICK, CHAS. KELLY, FRANK HANNIGAN, ROASLIE PAPES, T. VANDENENK, F. C. AVERY, A. O. JOHNSON, JOHN SULLIVAN, J. ABOHDEN, EMIL LINDQUIST, FRANK SMITH, HADE ROARK, G. W. BELL, ROBAK POWELL, PAT REDMOND, and EMIL STANK,

Appellees.

No. 1732

In the Matter of the Petition of THE NORTHWESTERN STEAMSHIP COMPANY, LIMITED (a Corporation), Owner of the Steamer "SANTA CLARA," an American Vessel, for Limitation of Liability.

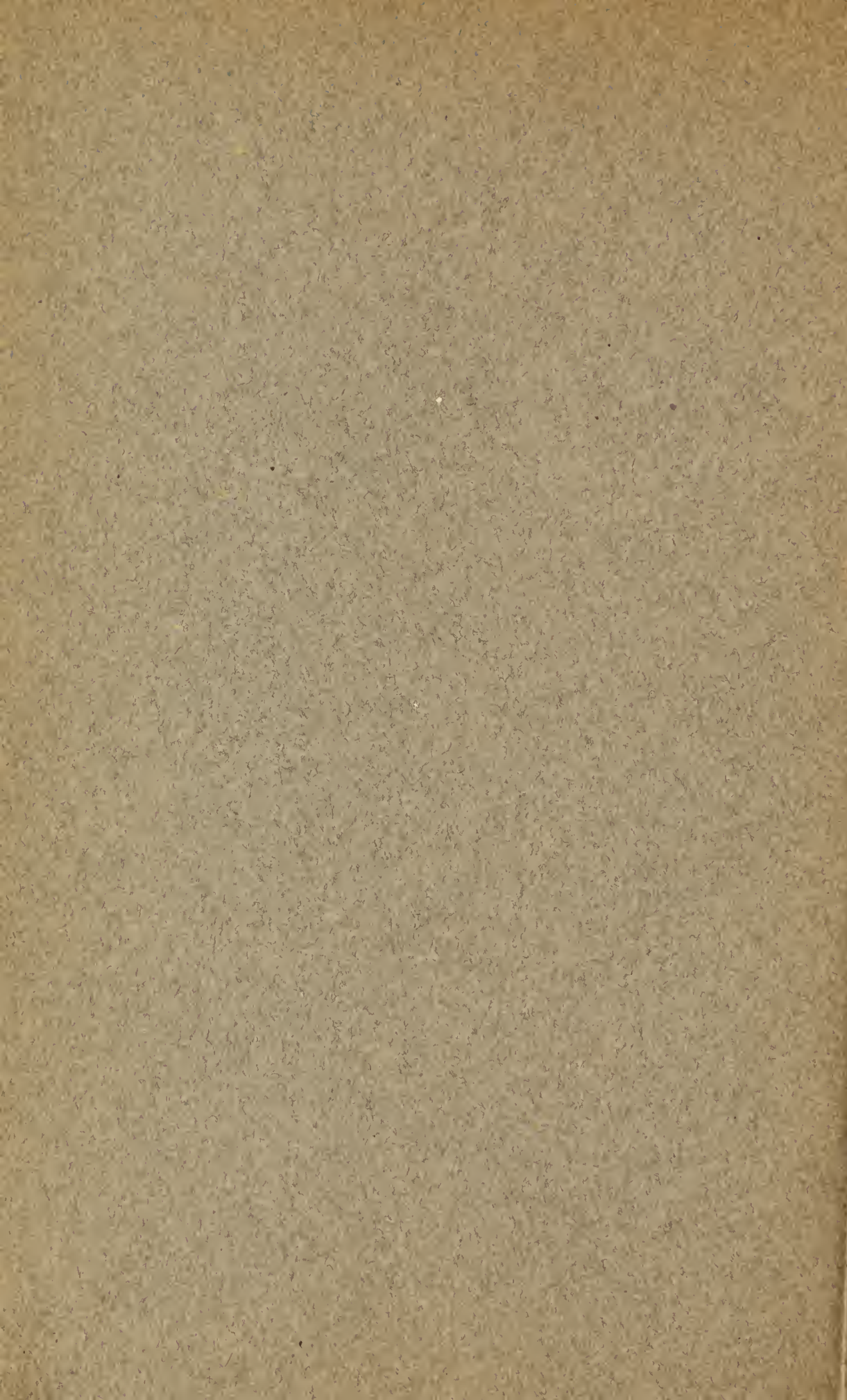
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Appellees

WM. MARTIN,
Proctor for Appellees.

204-8 Collins Bldg.,
Seattle, Washington.

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STATEMENT OF THE CASE.

The appellant on the 6th day of March, 1908, filed its petition in the lower court asking to have its liability limited to the value of the steamer

“Santa Clara” and the freight pending at the termination of a certain voyage made by the vessel from Uyak,, Seward and Valdez, Alaska, to Seattle, Washington, leaving the Alaskan ports on or about the 6th day of October, 1906, and terminating at Seattle, Washington, on or about the 21st day of October, 1906. Immediately upon the termination of the voyage of this vessel on the 21st day of October, 1906, the appellees each filed a claim for damages against The Northwestern Steamship Company, Limited, in the sum of \$500.00. The Company refused to recognize the claims and the appellees commenced separate actions in the Superior Court of King County, State of Washington, to recover damages in the sum of \$500.00 from the Company on account of its breach of their contract of carriage on this vessel and voyage. With the crowded docket in the Superior Court, the sum of \$300.00. A motion for a new trial was interposed by the appellant, argued and denied, and judgment entered in favor of the appellee, Sam Atkinson, for the sum of \$300.00 and costs amounting to \$114.40 (pp. 380 and 384). No appeal was prosecuted the appellant was able through dilatory tactics to delay the trial in the Superior Court of each of these actions for almost eighteen months, but finally the

cases were set for trial. The case of Sam Atkinson against the appellant was tried with a jury before the Honorable Arthur E. Griffin, Judge of the Superior Court of King County, Washington, and resulted in a verdict in favor of the appellee, Sam Atkinson, in cuted from this judgment. The appellant thereupon filed its petition for a limitation of liability in the lower court, and asked for an injunction against the appellees and against the Superior Court of King County, State of Washington, from trying or taking any steps towards the trying of any of these actions in the Superior Court. On the 11th day of March, 1908, an injunction was issued by the lower court enjoining and restraining the appellees from prosecuting their several suits in the Superior Court or their taking any steps whatever in the prosecution of these suits, and enjoined the Superior Court of the State of Washington for the County of King from all further prosecution or procedure in these actions (p. 25), and requiring the appellees to prosecute their actions before the commissioner appointed by the district court. The appellees made a motion in the district court to set aside the injunction, which motion was denied. The practice of the district court is to require all par-

ties having claims exactly alike to join in one libel for the purpose of unnecessarily encumbering the record. In this case an order was made permitting the appellees to join in one pleading in the prosecution of their claims against the appellant (p. 25). A pleading was filed in the nature of a libel by all the appellees answering the petition and adopting that part of the petition which set out the cause of action as alleged by each of the appellees in their complaint in the superior court, and in addition thereto alleging the unseaworthiness of the vessel. The petition itself set out the claim in full made by each of the appellees in their several complaints in the superior court. The claim or libel of the appellees was under oath (p. 69) and it was sworn to by William Lundberg, one of the appellees and libellants, and made for and on behalf of each of the appellees, and states that the affiant was a passenger, knew the contents of the claims and answer to be correct and true, and that the other appellees were absent from King County. No objection whatever was made to the answer and claims on account of the same not being verified by each of the appellees. Most of the appellees at that time were in the District of Alaska, and it would have been an impossibility to have se-

cured the affidavit of each of them to the answer or libel. The petitioner's objection to the answer and claims, is a denial of the facts alleged in the pleading (p. 55). The case then proceeded to trial the same as any ordinary admiralty suit, testimony was taken before the commissioner, W. D. Totten, and submitted to the Honorable C. H. Hanford, Judge, after argument. The only claims filed of course were those of the appellees, which totaled \$16,500.00. The appraised value of the vessel and freight pending was fixed by the appraisers at \$75,774.15, so that the only question presented to the lower court was the amount to be allowed the appellees, if anything, on their several causes of action against the vessel. The claim of the appellant, Sam Atkinson, had been passed upon by a jury and by Judge Griffin, and was placed in a final judgment. Judge Hanford also found for the appellees and fixed the amount of allowance to be made to each of them, including the appellant, Sam Atkinson, at \$300.00. Judgment was thereupon entered in favor of each of the appellees in the sum of \$300.00, so that the only question presented by the appeal, if it can be considered, is one of fact in fixing the amount of the allowance to each of the appellees, which has all been passed upon by a

jury and by the Honorable Arthur E. Griffin, Judge of the Superior Court of King County, Washington, and by the Honorable C. H. Hanford, District Judge.

ARGUMENT.

I.

It is questionable whether an appeal lies from the decision of the lower court. The appellant filed its petition in the lower court asking to have its liability limited to the value of the vessel and the freight pending at the termination of the voyage on which the causes of action alleged by the appellees arose, alleging that the appellee made claims for damages against the appellant in the sum of \$500.00 each, and set out their alleged cause of action in the petition (the facts alleged in the appellants' petition on which the appellees sought to recover being a copy of those alleged in their complaints in the superior court), and asked the district court to fix the amount, if any, due the claimants, and that the same be paid by the stipulations for the appraised value of the vessel. Everything that the appellant asked the lower court in its petition to do, it did. It granted the appellant a decree limiting its liability and assessed and allow-

ed the claims of the appellees in the sum of \$300.00 each, and directed that the same be paid by the stipulators for the value of the vessel and freight pending at the termination of the voyage. The lower court's decree in all respects was exactly what the appellant petitioned for, except that the petitioner had hoped that by depriving the appellees of a right by trial by jury it would receive a more favorable decision in a trial before the court.

It is a familiar rule that a party litigant cannot receive and accept the benefits of a decree and at the same time appeal from the decree. In this case the main purpose of the statute limiting liability of vessel owners is to relieve them from any judgments or claims in excess of the value of the vessel and freight pending at the termination of any venture or voyage with the vessel. This the appellant has received and the court in fixing the amount of the liability at not over one-seventh of the value of the vessel and freight pending at the termination of the voyage should not be heard to complain of the decree.

II.

The main point, however, presented on this appeal is whether or not the facts proven by the claim-

ants, or rather contestants' testimony, constituted a breach of the contract of carriage, and if so, whether or not the amount of the damages awarded were proper compensation to be allowed. These all are questions of fact and have been passed upon by a jury, by a judge of the superior court of King County, Washington, and by the honorable District Judge. It must be conceded that if the testimony of the contestants is to be accepted as true, and the inconvenience and suffering which they testify to undergoing is correct, there was a serious breach of the contract of carriage on this voyage and that the compensation allowed and awarded by the lower court was very small.

The lower court found that the steerage quarters were overcrowded and

“that the steerage passengers suffered discomfort from the filthy and bad condition of the steerage quarters is well proved. In the steerage there was 90 Chinese and Japanese fishermen, and a number of other foreigners, returning from a fishery where they had been employed during the preceding summer, and a company of United States soldiers. They filled all the space available for the accommodation of steerage passengers. The soldiers were received on board, after the vessel reached Valdes, but they occupied space especially reserved for them, so that the steerage passengers, other than the fishermen and soldiers, were not provided for. The fishermen

were all filthy and offensive in their manners. The Europeans were especially so, being intoxicated and turbulent, and the voyage was rough, and there was a good deal of seasickness. In view of these well established facts, and of the captain's testimony, it is absurd to expect the court to believe the testimony of employees on the vessel, tending to prove that the steerage was kept in a condition fit for human habitation. In his testimony, the captain makes the remarkable admission that conditions in the steerage were so bad that he did not care to go there, and only looked into it a few times." (pp. 323, 324).

This finding is well supported by the evidence. The testimony shows that there were about fifty steerage passengers who were not provided with any accommodations whatever and were compelled to lie around in hallways during the entire trip of twelve days without any place whatever in which to sleep. All the berths were taken by fishermen, who had been working for the petitioner Company, consisting of Russians, dagos, Chinamen and Japs. The Europeans were drunk, dirty, offensive, turbulent and abusive to the passengers during the whole voyage. They would not permit the passengers to sit or go to the first tables, and compelled them to eat what little they left of the food which was so bad and unwholesome that it could only be eaten by a man in a starving condition. The captain himself says:—

“Q. (Mr Campbell.) Did you go down in the steerage?

A. Yes, sir.

Q. Did you see anybody sick?

A. They were all sick—I wasn’t down there very often in that trip, because the mate told me they were all sick and drunk down there and I didn’t care to go down very often. (p. 301).

* * *

Q. (Mr. Martin.) Well, I am referring to those fishermen; they were a kind of rough crowd, weren’t they?

A. Why, I don’t know—when a man gets a little full he is generally rough—it is an actual thing.

J. G. Dillon, chief steward of the vessel on this trip, on cross-examination testified as follows:

“Q. (Mr. Martin.) You testified once before in the case in the Superior Court, didn’t you?

A. Yes, sir.

Q. I ask you if you didn’t answer this question as follows: ‘Q. What was the condition of the steerage passengers with reference to seasickness? A. I was kept busy from about eight o’clock in the morn-

ing until three the next morning—in fact, I didn't get to bed until late—from the time I left I never had my clothes off. I couldn't say who the men were, but there was an awful crowd of passengers." Is that correct?

A. That was quite a crowd for us because we hadn't been carrying such a crowd as that—we had, I suppose, three hundred and fifty passengers, I suppose, altogether.

Q. Why did they tell the steerage passengers that they could sleep around in the smoking-room and other places?

A. There was the big fishermen there and he would have his baggage in one standee and he slept in the other and his boots in the other, and those fellows had been drinking—they had some money given them when they left the cannery, and when they got to Seward they went up to the saloon and all got full, and when they come down they started fighting and "Big Barney" he was the leader.

Q. Did they practically drive the other steerage passengers out?

A. They were the boss of the steerage.

Q. The fishermen?

A. The fishermen; so the other fellows came back and said, 'Here, steward, that big fellow always jumps in my place. I had a bunk there last night, but another fellow has got it now.' I said, 'Go in the dining-room, go in the social hall, go anywhere you want;' in fact, we generally set a lunch-table in the night time—the half of the time we couldn't set up the table when those fellows would get in there, because they wouldn't change their clothes.

Q. That was the fisherman?

A. Some of those fellows.

Q. So that the odor was pretty bad down there?

A. Some of them fellows' feet was pretty bad; one of those fellows had on a khaki suit and he done his business and never took off his pants and came back for a drink and I never smelled anything like it in my life." (pp. 291, 292, 293.)

This is the appellant's own testimony from the captain of its vessel and the chief steward.

F. C. Avery, one of the appellees and whose testimony is the most conservative of the appellees, testified in part as follows:

"Q. (Mr. Martin.) Just go ahead and tell, Mr. Avery, what accommodations, if any, were given to you on that trip and voyage.

A. Well, to start in, when I bought my ticket I asked the man about the accommodations and he said I would need my blankets and that was all; that I would have a bunk and plenty of food and we would only be five days coming down. I wanted to buy a first-class ticket but he said he was out, and it would be only five days, and he said he thought we could put up with it and that the fare would be good, and so I bought a second-class. I came aboard the ship and I could not get any bunk and they didn't seem to try to provide for any, and instead of being five days it was twelve days coming down, and I never had a chance to take my clothes off the whole trip coming down, and I slept on the floor.

Q. It was more than twelve days?

A. No, sir, twelve days from Valdes; it was one day longer from Seward. And the grub was so bad we could hardly eat it.

Q. Now, state what effort you made to get a berth on that vessel.

A. Well, I went to the purser and also went to the captain and he said he would have the carpenter fix up some berths, and the carpenter came down where we were sleeping and there was just a short partition running out from the wall of the vessel, and he nailed two boards straight up and down from the floor to the ceiling and that was as far as he ever went towards fixing berths. There was some big sheets of boiler iron sitting up there and he threw them over on the floor and we had to sleep on them; on the top of the hatch; they were laid on the hatch.

Q. Did you sleep on this boiler iron when you did sleep on the voyage?

A. Yes, sir; that was the only place I had; that is all I could get.

Q. Did you look around for a better place?

A. Yes, sir.

Q. Could you find it?

A. No, sir.

Q. This is your signature on exhibit "C" (showing document to witness)?

A. Yes, sir.

Q. Were you up at my office when the claim was signed up?

A. Yes.

Q. Did you see those other passengers sign up there too?

A. Yes, sir.

Q. All at once?

A. All at the same time.

Q. The same parties whose names are on that exhibit "C"?

A. Yes.

Q. Were those parties on the vessel and on that voyage?

A. Yes, sir, we all went up there together to your office.

Q. From that trip?

A. Yes, the next morning.

Q. Now, where did they sleep on that voyage?

Mr. Campbell—I object to that as irrelevant and immaterial as to where other passengers than this one slept.

A. Well, they slept on the floor and on the tables and under the tables and in the smoking-room; in fact you would find them all around the ship in little blind hallways and any place they could get.

Q. (Mr. Martin.) How many parties were sleeping on the floor and in the hallways?

(Same objection interposed.)

A. I should judge there was in the neighborhood of fifty.

Q. I will ask you if there were more people sleeping on the floor than those parties that signed up this claim with you?

(Same objection and also as irrelevant, immaterial and incompetent.)

A. Yes, sir.

Q. More besides that?

A. Yes.

Q. What, if any, effort was made there by those other passengers mentioned in this exhibit "C" to procure a berth, that you saw?

(Same objection and also as leading.)

A. It seems they were all in about the same box — they were running to the captain and the purser and the mate, but it didn't do any good. (pp. 79, 80, 81, 82.)

* * *

Q. (Mr. Martin.) What part of the ship was this in which you were required to sleep on this boiler iron?

A. It was underneath the deck, inside of the vessel; I don't know what part they call it; it was down below.

Q. Was it on the same deck that the other passengers were sleeping on?

A. No, sir—that is the second-class, it was the same deck.

Q. But in a part not prepared for sleeping quarters?

A. No, sir.

Q. Now, just state to the commissioner here now and the Court what inconvenience you suffered by reason of being compelled to sleep in this part of the vessel on this boiler iron and not being provided with any berth.

(Objected to as leading.)

A. Well, it was almost impossible to get much sleep because the boiler iron laid sort of in a hall where the sailors and everybody, and the Chinamen were going backwards and forwards in the forward

part of the vessel and they had to walk over it and every time they touched it it would flap together.

Q. Rattle?

A. Rattle, Yes.

Q. State how frequently they walked over it, if you can.

A. Well, it seems like every half hour or so all night somebody walked over it.

Q. State whether or not anyone was walking or roaming around in that department at night.

A. Yes, sir; there were Chinamen gambling all around there and they were up and down and out and in there all night, and the sailors were passing backwards and forwards. One or two nights one of the sailors came in there drunk and we found him lying right across our bed asleep, and we had to rout him out.

Q. State whether you suffered much from this inconvenience.

A. Yes, sir, I did; I was not able to navigate when I got down here; I was tired out—I didn't have no chance to take my clothes off on the whole trip, and getting no rest and no place to sit down only just lay down on this place there.

Q. Could you lie down there in the daytime?

A. No, sir; the place was used in the daytime for the Chinamen to get their meals in and set their tables up on. (pp. 83, 84)

* * *

Q. What kind of water did they furnish you to drink on that trip?

A. The water was very filthy; it was warm and salty and also dirty and filthy.

Q. What kind of food was furnished you?

A. The food was bad; there was very little of it; you could not eat it at all.

Q. Describe fully to the Court.

A. The meat generally it was some kind of a stew and it was spoiled meat before it was cooked evidently, from the smell of it and there would be some few vegetables mixed with it, and they had sour bread that we could not eat at all and tea and coffee—that was about the principal diet on the trip. (p. 85.)

* * *

Q. To what extent was the meat decayed?

A. Well, you could smell it all over that part of the vessel where they fed us.

Q. Was it palatable?

A. No, sir. (p. 85.)

* * *

Q. What was the condition of your health when you went aboard the vessel?

A. It was good; I had been working hard all the summer.

Q. What was it when you came ashore in Seattle?

A. Well, I was pretty crippled up with rheumatism and weak from the trip; it was a month before I felt strong enough to go to work again or do anything. (p. 87).

* * *

Q. What was the condition of the vessel as to cleanliness?

A. Well, it was filthy, to tell the truth of it. The quarters where they had us was very filthy, wet and damp, and the closet down there was slopping over and running over on the floor and everybody that went through there would drag it all over the vessel, and also at night time when they would walk over it when we were asleep they would drag it right on to us—walk right over the closet and drag it over us. (p. 88).

* * *

Q. Did the Chinamen pass around where you were?

A. Yes, they had to walk right over us and pass right around when they would go to this closet—we slept right between them and this closet. (p. 89).

* * *

Q. Now, what, if anything, did you notice unusual about the vessel in navigating?

A. Well, the second or third day out they had an accident of some kind, one of the boilers was out of commission and they weren't making any time, and all the information we could get was that they took all the steam they could get from the other boiler to keep the pumps agoing, she was leaking so bad. (p. 90.)

* * *

Q. What, if anything, did you notice of the vessel laying to?

(Objected to as leading.)

A. She was lying to some of the nights before they got to Juneau they laid to one night all night.

Q. What seemed to be the matter?

A. Well, I could not tell, unless they were afraid to go ahead, as if they didn't know where they were. I couldn't tell what it was; and one night when they were working on the boilers they were laid up I guess.

Q. Did you notice whether the pumps were running?

A. Yes.

Q. What, if anything, was said on that trip right at the time about it taking all the steam that the boiler could keep up to keep the pumps going?

(Objected to as hearsay and leading.)

A. It was the principal talk among the sailors and ship hands.

Q. Who did you hear saying that, if anyone?

A. The second engineer.

Q. What did you hear him say?

A. He said they were crippled; he didn't know how they were going to get out of it. He said it took about all the steam they could make to keep the pumps a-going and keep the vessel headed to the wind." (p. 91).

Q. (Mr. Martin.) You met the claimants in this action on board the vessel and in my office when they signed up this suit?

A. Yes, sir.

Q. Did you see any of these passengers drunk or disorderly on the boat?

A. No sir.

Q. I will ask you if it is not a fact that the fishermen monopolized the steerage and were drunk and disorderly on the trip?

Mr. Campbell—I object to that as being leading and immaterial.

A. Yes, sir.

Q. I will ask you if any effort was made by the officers of the vessel to restrain these fishermen and make them be decent and orderly?

A. Not that I seen or heard of.” (318)

Appellee Roark testifies:

“Q. (Mr. Martin.) I will ask you to examine passengers’ exhibit “C,” and state if that is your signature there, Mr. Roark? (Showing.)

A. That is it.

Q. Were you present when those other passengers and claimants here signed that?

A. Yes, sir; we were all together there.

Q. That morning?

A. The next morning, after we came off.

Q. It was signed up in my office, wasn’t it?

A. Yes, sir.

Q. These other parties there that came up with you that signed that exhibit, were on the boat with you?

A. They were right there.

Q. Now did you see them sleeping around on the floor?

(Objected to as leading and irrelevant, immaterial and incompetent.)

A. Yes, sir; they didn't have any better accommodations than I did, that is, that I noticed.

Q. About how many people did you see sleeping around on the floor and on the hatches and places like that without berths?

Mr. Campbell.—I object to that as irrelevant, immaterial and incompetent, and as having no bearing on the measure of damages.

A. About thirty or forty, the way it looked to me. I didn't count them, but I know there were quite a number of them.

Q. Now state whether or not you suffered any from cold and inconvenience from want of sleep or

from sleeping that way.

(Objected to as leading.)

A. We did, certainly.” (pp. 120, 121.)

“Q. Describe fully what you had to eat and what the condition of it was.

A. Well, they had mulligan, mostly, and they would have the meat cut up in chunks and put in there, and potatoes.

Q. How was that?

A. Well, that meat would kill the whole thing—it would smell so strong it would make the whole mulligan smell—you could smell the meat.

Q. Did you suffer any from hunger?

(Objected to as leading.)

A. Yes, sir, I did; I could have eat most any time, but I didn't eat.

Q. To what extent? Describe your sufferings fully.

A. Quite a lot. About as bad a way as a man can punish himself is not to have enough to eat. I know that because I have toughed it and roughed it all my life, but I never was up against any harder proposition than that; in the Spanish-American

army when they didn't have two meals a day half the time, you didn't have that—it was far ahead of this.” (123, 124.)

Appelle Johnson testifies:

“Q. Where did you sleep, Mr. Johnson?

A. I slept on the floor about amidships—that is, part of the time, during the first off.

Q. And then where did you sleep?

A. I slept on the table one or two nights, but it was a hard place to get because the flunkies occupied that table down the steerage—the flunkies did themselves—I guess there was a half a dozen workaways and they occupied that.

Q. That was considered an advantageous point to sleep on?

A. You could not sleep more than a minute before you would get rolled off. I tried it but got rolled off several times and then I slept on the floor about amidships.

Q. Still you would be up out of the dirt and slime on the table?

(Objected to as leading.)

A. Yes.

Q. Just go ahead and tell the condition of it, how things looked when you got aboard.

A. Everything was packed and every bunk occupied, and I guess there was about a half a dozen of them vomiting around there, those fishermen; they were drunk.

Q. The fishermen were drunk?

A. Yes, they were drunk and I staid on top of the deck until late in the evening, and I went down there and the smell was something awful, but they closed th door and they left it open about six inches and they had a chain on it, because it was so rough, and we had to stay in there, and I laid down below and the next day I was sick, and I was sick until I got to Juneau, and then I felt a little better, and we laid there half the night and part of the next day at Juneau and then we started by the inside, and it got smooth and I got to feeling better and I tried to get something to eat and I had a hard time of it. (p. 149.)

Q. Now, before we come to that, describe the condition of the vessel down there where you were as to cleanliness.

A. Well, in the first place, the Japs had one part of it and the Chinese the others, and between the two of them there was a couple of dogs in there that made it pretty bad, and certainly it was sloppy and wet all over the steerage department.

Q. What effort did you see them make to clean it up?

A. Well, we reported it; we told the steward and another fellow that came around, I think it was

the chief or the second steward. I think it was, and he said he would do this and do that but there was never anything done, and then at last there was three or four of them went up to see the captain and I didn't hear much what they done, but I know there was nothing done there afterwards.

Q. They made complaint to the steward first?

A. Yes.

Q. And then to the Captain?

A. Yes.

Q. And when, if at any time did they clean it down there?

A. Well, they didn't clean it until we got, I think, within about a day of port here.

Q. Before the inspectors got around?

A. Yes; they opened it up and cleaned it out, I think it was a day, maybe it was the same day, we landed. I think it was the same day because we landed here in the evening.

Q. Did you see many other people in that department sleeping without berths?

(Objected to as irrelevant, immaterial and incompetent.)

A. Well, they were all around me; all the tables

were occupied and in between the aisles was occupied, and in the boiler-room I think there was six or seven sitting on that open part on the top of the boiler; it was kind of corrugated screen above the boiler and about six or seven set up there and slept all night, and then around the steps there was always two or three lying there.” (pp. 148, 151.)

“Q. What do you know, if anything, about a shortage of provisions?

(Objected to as leading.)

A. Well, they told us that when we first got aboard.

A. When we were out to sea and they didn't give us anything we asked the chef if he could not get us something, and he said they were short; I think it was the third turn that I got a chance to get to the table, for those fellows in the bunks they occupied the aisle and as soon as he touched the bell they all fell out, and it took three turns before they were done.

Q. So that the regular passengers were not able to eat until after the fishermen got through?

A. Not until after the fishermen got through the passengers were not able to eat, because the fishermen occupied the bunks and the passageway, and there was nobody else could get in there until they got through.

Q. Do you know whether or not they were employed by the company?

A. That is what they said they were, they were employed by the company.

Q. (Mr. Martin.) State whether or not they were given the preference on the boat.

A. Well, they had everything their way because they had the bunks, and the bunks was right along where they ate—I guess there was not two feet of room, counting the table and all, because you had to go sideways and they were all in those bunks, and they each put their feet out as soon as they put anything on the table, and as soon as he touched the bell, down they would be, and then the next would be the same way, from the other bunks; they would all come over, so that there was no chances for an outsider to get anything until the third or fourth turn, and then there was not anything left, and the chef says, “We are short,” and we had to cut down, and we had to take what was left.

Q. Was that, generally speaking, true of the rest of the passengers?

A. Yes; those that didn't have bunks, only the ones that had bunks were fishermen.

(Objected to, and motion to strike out as hearsay.)

A. (Continuing.) As far as I could see—there may be one or two that had bunks, but I didn't know of any.

Q. Now, look at the signature A. O. Johnson, on exhibit "C" (showing); is that your signature?

A. Yes, sir.

Q. You recognize those other names there?

A. Well, I was there when they all signed.

Q. And did you go aboard with those same fellows?

A. With the most of them; some of them got on at Seward; I know quite a few of them from Seward.

Q. Where did the rest of them get on?

A. Valdes.

Q. Did any of these passengers that got on at Valdes get berths?

(Objected as irrelevant and immaterial.)

A. No, sir; because I was the first one getting down there, and I saw most of them getting on with their bags after I was on and I investigated the whole thing when I got on and I could not find anything.

Q. Now, were you present when these gentlemen signed this?

A. Yes.

Q. Are those the same parties that were on the boat?

A. Yes.

Q. And what accommodations did they have, if any, different from what you had?

A. They didn't have any different from mine.

Q. Just the same as yours?

A. Just the same as mine. (pp. 153, 154, 155, 156.)

The evidence in support of the court's finding is not even conflicting. The appellant's own evidence supports these findings of the court as strong as the appellees'; but even though the evidence were conflicting, this court's ruling would necessarily be the same. In the case of *Perriam v. Pacific Coast Co., et al.*, 133 Fed. 140, where the testimony was taken before a commissioner and reported to the court, as in the case at bar, this court in an opinion written by Judge Gilbert says:

“The general rule is well established, and has been repeatedly affirmed by this and other courts, that the findings of fact of the trial court in an admiralty case made upon conflicting testimony will not be disturbed on appeal, unless they are found to be clearly against the weight of the evidence. The *Alijandro*,

56 Fed. 621, 6 C. C. A. 54; *Whitney v. Olsen*, 108 Fed. 292, 47 C. C. A. 331; *The Oscar B.*, 121 Fed. 978, 58 C. C. A. 316; *Memphis & Newport Packet Co. v. Hill*, 122 Fed. 246, 58 C. C. A. 610. It is equally well established that the amount of the award in a salvage case, resting, as it does, largely in the discretion of the trial court, will not be readjusted in an appellate court, where there has been no mistake of fact of application of an unwarranted rule of compensation in arriving at the award. *Simpson v. Dollar*, 109 Fed. 814, 48 C. C. A. 663, and cases there cited; *The Flottbek*, 118 Fed. 954, 55 C. C. A. 448, 458. While we are disposed to think that the award in this case may have been greater than the actual peril of the *Nelson*, as we understand the testimony, warranted, we would not feel justified in disturbing it.”

The appellees submit that under the well settled rules of this court where even the evidence is conflicting, the appellate court will not review the findings or decisions of the lower court on questions of fact rather than to determine that the evidence is conflicting, and in such event will accept the findings of the lower court as conclusive.

III.

The appellant also alleges that the amount awarded by the lower court to each of the appellees was excessive. This matter likewise is a determination of a question of fact by the lower court and will not be disturbed any more than any other finding of

fact on conflicting evidence, unless it be found to be clearly against the weight of evidence. The question of the amount to be awarded to each of the appellees was passed upon by jury in the superior court, who had an opportunity of seeing and hearing the witnesses for appellees and appellant in the Avery case and awarded the appellee, Avery, the sum of \$300.00. This amount was again approved by the Honorable Arthur E. Griffin, Judge of the Superior Court, on a motion for a new trial and a judgment entered for that amount. Practically the same evidence was again submitted to the Honorable District Judge C. H. Hanford, and he again awarded each of the appellees the sum of \$300.00 as damages. This award for the suffering, humiliation and inconvenience which each of these appellees underwent on this vessel, and the fear and dangers which they were subjected to, is less than should have been awarded. The appellees testify that there were at least forty other passengers lying around on the halls and floorways in the steerage without being provided with accommodations whatever, or any effort being made to relieve their condition. The waiters were all workaways, who would do nothing more than they were compelled to do, and had no regard for the care, comfort or convenience of the

passengers, and while the lower court was not able to find on the testimony that there was a breach of the contract on account of the bad and insufficient food furnished, or on the unseaworthiness of the vessel, yet this court can not escape the fact on reading this testimony that the food was wholly unfit for consumption and positively dangerous to eat. It was the intention of the officers to come the outside passage from Seward to Seattle, which was usually made in five days; that they took the inside passage, which consumed about thirteen days, during all of which time these passengers were pent up in the condition described by the captain and chief steward; and while it was impossible for the appellees to prove unseaworthiness of the vessel, it is admitted that the vessel was delayed on the voyage by reason of defective boilers; and it is also admitted that when the vessel reached Seattle it went on the dry dock and had two large sister keelsons placed in her and repaired for the next voyage to the one out of which this suit arose, and when the vessel was making the very next voyage she was found to be leaking so badly before they got out of the Straits of Juan de Fuca that the vessel was compelled to return to Seattle, which she did with great difficulty, and had

it not been for the assistance she received when she got into the harbor at Seattle would have foundered. Under these circumstances we submit that the award made by the lower court is conclusive and not even subject to review in this court.

IV.

It is also contended by the appellant that in as-much as all of the appellees did not testify and that the pleading or claim filed by the appellees under oath was made by one of the appellees, the court should not allow damages to any of the appellees except those who may have testified. It is the rule of the lower court to impose terms upon libellants or claimants when they pile up a lot of cumulative evidence, and the lower court will only permit of the taking of the testimony of a portion of the libellants where they are numerous, as they are in this case. This rule and method of procedure was adopted by the Honorable C. H. Hanford in the trial of the Oregon Case, and approved by this court in its decision reported in 133 Fed. 609.

The tickets of the appellees were put in evidence showing that they were passengers, the passenger list also showed the same fact, and the witnesses tes-

tifying testified that all of the appellees were without berths and subjected to the same suffering and inconvenience and conditions that they did; that they all left the boat together and went and employed counsel, and on the same day that the vessel arrived at Seattle signed up a claim and served it on the Company which was signed by each of the appellees for damages in the sum of \$500.00 each (pp. 386, 388). Not only that, but suits were started in the Superior Court and after a delay of almost eighteen months had reached a point at which the same were set down for final trial, when the petition for limitation of liability was filed in this section by the appellant, in which petition the appellant itself again set out the claim made by each of the appellees, under oath, in their complaints in the Superior Court. The libel or claim was made up in the same manner that pleadings are usually made up in a libel suit, and it was verified in the manner called for by the rules of practice in admiralty, and no objection was ever made to it in the lower court on that grounds, and the complaint for that reason and assignment of error is first made in this court. Judge Seaman, in the case of *In re Davidson S. S. Co.*, 133 Fed. 411, says:

“Upon the further issue of liability for damages arising out of the collision the petitioner brings the case within rule 56, which reserves its right to contest such liability. ‘No presumption arises from the happening of a collision against either vessel’ (*Henry’s Admr. Jur. and Proc.*, Sec. 82) without fault on the part of one shown or confessed, and it is unquestionable that the general rules and practice in admiralty intend that all issues be well defined by pleadings in some form, with simple and explicit allegations of fact. I am satisfied, therefore, that the claim under which proof of liability is to be presented (rule 55) must be treated as a pleading in the nature of libel, and must set out ‘the various allegations of facts upon which the claimant relies in support of his suit,’ in accord with rule 23. While this requirement is not expressed in rule 55, and neither of the rules states method of framing such issue, nor mentions an answer to the claim, the hearing cannot proceed as contemplated by rule 55, for the purpose of a contest, without an issue presented in some form. The claimant, though called into court by the motion to prove any claim it may have, must prove that the damage was caused by fault of petitioner’s steamer, or fail of recovery. The petitioner is relieved from confession of liability by the allegations to that end in a petition; but those allegations are incidental only, and do not enter into the consideration of the primary and independent issue tendered by the petition to limit liability. Nor can they serve to relieve the claimant of the need to state and prove a cause of action when the issue of liability is reached without violating well-settled general rules governing such issues; and these rules, under the limited liability act, do not impress me as intending such reversal of the established order of pleading and proving liability. The statutory provisions which are applicable are

quite general in terms. Section 4284, Rev. St. (U. S. Comp. St. 1901, p. 2943), provides that one and the other parties 'may take the appropriate proceedings in any court' for apportioning any liability. It goes without saying that the fact of liability must be ascertained primarily. What is the 'appropriate proceedings' to that end? In the chapter on '*Limitation of Liability*' incorporated in the third edition of Benedict's Admiralty Practice the statute and rules are discussed, and the practice generally is exemplified with satisfactory clearness; but the present inquiry is not discussed, and no light is furnished in that excellent treatise for its solution. With no precedents interpreting the rules as to the practice upon such issue, I am of opinion that they intend the appropriate judicial hearing of the controversy over liability, with the issues presented upon distinct allegations of fact for and against the claim; that claimant must state, as the fundamental requisite of apportionment and recovery for damages arising out of the collision, a *prima facie* case of liability on the part of the petitioner's vessel, such liability being expressly reserved for contest; and that the petitioner becomes respondent in respect of such issue, and may either answer the claimant's allegations by counter statement of facts, consistent with the petition, or have the averments of the petition thereupon adopted for the purpose of the issue."

We submit that the procedure adopted by the district court in this case should be commended, and that no good purpose could be served by having each libellant file a long and separate libel to encumber the record. And it saves a considerable expense in

the prosecution of an action. The appellant was not prejudiced in any manner, but was benefitted by the joinder of the appellees in one libel or claim, besides, as stated, no objection was made to this mode of procedure or to the verification of the libel in the lower court at all.

V.

The appellees ask that this court impose damages in the sum of ten per cent. on the amount of the judgment upon the appellant, for the reason that it must be apparent to this court that the only purpose of prosecuting this appeal was for the purpose of delay, annoyance and damage to appellees, and that under the rules of this court that terms be imposed therefore.

This court will find the findings of the lower court well supported by the evidence, and that really the only question presented is a question of fact, which the appellant well knew could not be considered by this court, and that in prosecuting this appeal it was simply prosecuted as this Company, The Northwestern Steamship Company, Limited, does for the purpose of injuring the parties litigant and annoying them as much as possible.

The records of this court show a number of appeals similarly prosecuted to this court by the appellant. Such delays are injurious to the appellees; they put the appellees to a large expense and wast of time unnecessarily, and have but one purpose,—to deter parties from going into court on a meritorious cause of action to obtain redress, and enables the appellant to carry on his business in the manner in which it did in this case without regard to others' rights and with a notification to them that it may violate its contracts with impunity and that the injured party can not obtain redress, if at all, within about three years' time. They insist on violating their agreements and contracts, and take advantage of the court's procedure for redressing wrong.

Appellees respectfully submit that the judgment of the lower court in all respects should be affirmed, and that damages should be awarded in the sum of ten per cent. and added to the amount of the judgment against the appellant for prosecuting this appeal without merit and merely for the purpose of delay, annoyance and injury to the appellees.

WM. MARTIN,
Proctor for Appellees.